A **PUTRI AYU ISMAIL & ANOR v. RAULAMMAH NOORAIAH**

HIGH COURT MALAYA, PULAU PINANG
COLLIN LAWRENCE SEQUERAH JC
[CIVIL APPEAL NO: 12B-9-01-2013]
3 MAY 2016

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DAMAGES: *Loss of earnings – Income derived from illegal source – Deceased was driving school children without valid licence – Ex turpi causa non oritur actio – Whether should be taken into account for computing loss of earnings – Whether based upon policy consideration – Whether claimant should be allowed dependency claim for loss of earnings*

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The appeal raised the issue of recovery of damages for loss of earnings derived from an illegal source of income. It was therefore about the defence of illegality or *ex turpi causa non oritur actio*. The respondent's ('the plaintiff') claim arose out of a running down action during which the plaintiff's husband died. The liability was apportioned 50:50 to the plaintiff and the appellants ('the defendants'). The main basis for the appeal was that the income the deceased had earned before his demise was derived from an illegal source and should not have been taken into account for purposes of computing loss of earnings. In the alternative the defendants argued that the Sessions Court had adopted a wrong calculation in assessing the loss of earnings by not making appropriate deductions. Hence, the issue for the court's determination was whether the plaintiff could recover damages for loss of earnings by her late husband when the income derived from an illegal source. In the course of the trial at the Sessions Court, the plaintiff had admitted that her husband was driving a van without a special permit under the Road Transport Act 1987 by transporting school children from their homes to school.

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Held (allowing appeal with costs; setting aside award for dependency claim by Sessions Court):

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(1) The claims founded on the claimant's own illegal or immoral acts are encapsulated in the well-known maxim *ex turpi causa non oritur actio*. Based on the authorities, the very basis of the maxim *ex turpi causa non oritur actio* is that of public policy. Therefore, it must be that what is illegal is illegal without exception. To attempt a distinction between various degrees of criminality would inevitably lead to confusion and uncertainty which is not the avowed objectives of the legal process. (paras 8 & 58)

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(2) Since the maxim *ex turpi causa non oritur actio* is based upon policy consideration, there is no room for the court to indulge in the mechanics of deciding what was reprehensible or repugnant enough to justify

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allowing or not allowing the claim because of its illegal nature. To allow the claim would be for the court to countenance illegality, however small or insignificant it may be. (para 48)

(3) The application of the maxim in denying recovery would result in undue hardship to the plaintiff. Nevertheless, the objective of the law is to ensure certainty and uphold the integrity of the judicial process in not countenancing a breach of the law as much as it is to dispense justice to those who deserve it. The practical considerations of the deceased driving school children without a licence and the dangers it might pose could not be underestimated. (paras 49 & 51)

(4) A distinction has to be made between dependency claim for loss of earning arising from an illegal source and a claim arising as a cause of action for negligence where the injured party in a running down action might himself be in breach of some traffic law or regulation. A road user who himself is guilty of a breach of road traffic regulations but suffers injury as a result of the negligent act of another does not necessarily see his or her claim as a whole being extinguished altogether due to the illegality. Loss of earnings arising from a cause of action in negligence due in part to some illegal or unlawful act on the part of the injured party will only be irrecoverable where the source from which they were derived was illegal. In some measure, the law does provide for adjustment for such cases in the form of contributory negligence on the part of the plaintiff. (paras 61 & 66)

(5) Public policy considerations demand that any breach of the law results in consequence adverse to the party relying on it. Therefore, the dependency claim for loss of earnings by the plaintiff ought not to have been allowed by the Sessions Court on the ground that the application of the maxim *ex turpi causa non oritur action*. (para 67)

Case(s) referred to:

Burns v. Edman [1970] 2 QB 541 ***(refd)***
Che Wil Che Ali v. Mahmood Ismail [1982] CLJ 484; [1982] CLJ (Rep) 420 HC ***(refd)***
Chua Kim Suan & Teoh Teik Nam (Suing As Administratrix And Administrator Respectively Of The Estate Of Teoh Tek Lee, Deceased) v. Government of Malaysia & Anor [1994] 1 CLJ 321 SC ***(foll)***
Dhlalmini v. MMF 1992 (1) SA 802 ***(refd)***
Dhlalmini v. Protea Assurance Co Ltd 1974 (4) SA 906 ***(refd)***
Euro-Diam Ltd v. Bathurst [1990] 1 QB 1 ***(refd)***
Gray v. Thames Trains Limited [2009] UKHL 33 ***(refd)***
Holman v. Johnson (1775) 1 Cowp 341 ***(refd)***
Kang Bark Teng & Anor v. Lee Kwee Lim & Anor [1952] LNS 42 HC ***(refd)***
Le Bagge v. Buses Ltd [1958] NZLR 630 ***(refd)***
Lebona v. President Versekeringssmaatskappy BPK 1991 (3) SA 391 ***(refd)***
Les Laboratoires Servier And Another v. Apotex Inc And Others [2014] UKSC 55 ***(refd)***
Mankebe NO v. AA Mutual Insurance Association Ltd 1986 2 SA 196 (D) ***(refd)***
Meadows v. Ferguson [1961] VR 594 ***(refd)***

Ooi Han Sun v. Bee Hua Meng [1991] 1 LNS 110 HC ***(refd)***
Siti Rohani Mohd Shah & Ors v. Hj Zainal Hj Saifiee & Anor [2001] 1 CLJ 498 HC ***(refd)***
Smith v. Jenkins (1969) 119 CLR 397 ***(refd)***
Sukatno v. Lee Seng Kee [2009] 4 CLJ 171 CA ***(dist)***
Tan Chooi Thin (W) & Anor v. Teo Whee Hong [1953] 1 LNS 105 HC ***(refd)***
Tay Lye Seng & Anor v. Nazori Teh & Anor [1998] 3 CLJ 466 CA ***(refd)***
Tinsley v. Milligan [1994] 1 AC 340 ***(refd)***
Topaiwah v. Salleh [1968] 1 LNS 161 FC ***(refd)***
Wakil Diri Bagi Harta Pusaka Atas Rosli Md Nor (Simati) & Ors v. TP Saffeer & Anor [1998] 4 CLJ 241 HC ***(refd)***
Yaakub Foong Abdullah v. Lai Mun Keong & Anor [1986] 1 CLJ 355; [1986] CLJ (Rep) 790 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 7
Road Traffic Rules 1959, r. 35
Road Transportation Act 74 of 1977 [S. Africa], s. 31

For the appellants - Kuan Aun Wan; M/s Ajmer Sandhu & Ong
For the respondent - Saravana Kumar Koothaperumal; M/s Jega Kumar & Partners

Reported by S Barathi

JUDGMENT

Collin Lawrence Sequerah JC:

Introduction

[1] This appeal raises the issue of recovery of damages for loss of earnings derived from an illegal source of income. It is therefore about the defence of illegality or *ex turpi causa non oritur actio*.

[2] The appeal is brought by the appellants abovenamed in respect of the decision of the Sessions Court at Butterworth only in respect of quantum awarded. The respondent was the plaintiff at the Sessions Court while the appellants were the defendants. The facts giving rise to the claim in the Sessions Court arose out of a running down action during which the husband of the respondent died.

[3] After a trial at the Sessions Court, liability was apportioned 50% to the respondent and 50% to the appellants. The usual damages in such actions were awarded by the Sessions Court to the respondent. These are not in issue except for the dependency claim for loss of earnings where the sum of RM61,200 was awarded to the respondent. Although other grounds of appeal in respect of the dependency claim in the memorandum of appeal were raised, by way of an amendment to add a further ground, the issue of loss of earnings from an illegal source was included. The determination of this

additional ground I find, if favourable to the appellants, will determine the outcome of this appeal. In that event, there would arise no necessity to consider the other grounds.

[4] I find therefore that the main basis for this appeal is that the income the deceased had earned before his demise was derived from an illegal source and should not have been taken into account for purposes of computing loss of earnings. In the alternative, the appellants argue that the Sessions Court had adopted a wrong calculation in assessing the loss of earnings by not making appropriate deductions.

[5] The respondents' cause of action arises under the provisions of the Civil Law Act 1956 and under s. 7 as follows:

> Part III Fatal Accidents And Survival Of Causes Of Action
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> 7. Compensation to the family of a person for loss occasioned by his death
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> (1) Whenever the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code [Act 574].
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> (2) Every such action shall be for the benefit of the wife, husband, parent, and child, if any, of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased.
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> (3) The damages which the party who shall be liable under subsection(1) to pay to the party for whom and for whose benefit the action is brought shall, subject to this section, be such as will compensate the party for whom and for whose benefit the action is brought for any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect or default of the party liable under subsection (1):

[6] Can the plaintiff recover damages for loss of earnings by her late husband when the income derived emanated from an illegal source?

[7] This issue arose during the course of the trial at the Sessions Court. It is not in dispute that during the cross examination of the respondent, she admitted that her husband had driven a van without a special permit under the Road Transport Act 1987 by transporting school children from their homes to school and back and that this was illegal.

A ***Ex Turpi Causa Non Oritur Actio***

[8] It is essential to first examine the basis of the maxim *ex turpi causa non oritur actio* and the manner in which it has been applied before determining the outcome of this appeal. The issue of recovery of damages based upon an illegality is not new. It is a well-known concept in the law of contract. However, is a commonly held view that it has limited application in the law of tort. The idea of claims founded on the claimant's own illegal or immoral acts is encapsulated in the well-known Latin maxim, *ex turpi causa non oritur actio*.

[9] The exact origins of this maxim is shrouded in the mists of antiquity. However, the law on the point was already in existence and perhaps even well-established as far back as 1775 when Lord Mansfield propounded the principle in the case of *Holman v. Johnson* (1775) 1 Cowp 341, 343; (1775-1802) All ER Rep 98; 98 ER 1120 as follows:

> The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*.
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> ... The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say.

[10] It can be clearly discerned from the above pronouncement that the concept is founded on grounds of public policy. In *Les Laboratoires Servier And Another v. Apotex Inc And Others* [2014] UKSC 55; [2015] 1 All ER 671, it was said about the concept propounded by Lord Mansfield:

> Lord Mansfield's formulation begs many questions. But as these citations show, two features of this area of law have been characteristic of it from the outset. First, it is a rule of law and not a mere discretionary power. Secondly, it is based on public policy, and not on the perceived balance of merits between the parties to any particular dispute.

[11] In the *Les Laboratoires* case, it was opined that there was no consistency in the application of the doctrine and that the only way to address the problem was to relegate the rule into a mere power whose actual exercise would depend on the perceived equites of each case. This would leave room for the rule to be applied in a discretionary manner.

[12] In the English Court of Appeal decision in *Euro-Diam Ltd v. Bathurst* [1990] 1 QB 1, it was held: A

> in all the circumstances it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts. B

[13] This notion of employing the "public conscience" test did not however find favour with the House of Lords in *Tinsley v. Milligan* [1994] 1 AC 340 who regarded it as unprincipled. Lord Goff gave the leading judgment and held as follows: C

> That principle has been applied again and again, for over two hundred years. It is applicable in courts of equity as well as courts of law: see e.g.,the notes to *Roberts v. Roberts* (1818) Dan. 143, 150-151, and *Ayerst v. Jenkins* (1873) L.R. 16 Eq. 275, 283, per Lord Selborne L.C. In 1869 Mellor J. said that the maxim *in pari delicto potior est conditio possidentis* "is as thoroughly settled as any proposition of law can be": see *Taylor v. Chester* (1869) LR 4 QB 309, 313. It is important to observe that, *as Lord Mansfield made clear, the principle is not a principle of justice; it is a principle of policy, whose application is indiscriminate and so can lead to unfair consequences as between the parties to litigation. Moreover the principle allows no room for the exercise of any discretion by the court in favour of one party or the other*. (emphasis added) D E

[14] The judgment makes clear in no uncertain terms that there is no room for the exercise of discretion in the application of the doctrine which Lord Goff regarded as "established rules of law". Lord Goff rejected the public conscience test because to him it required the court to: F

> weigh or balance, the adverse consequences of respectively granting or refusing relief. This is little different, if at all, from stating that the court has a discretion whether to grant or refuse relief. It is very difficult to reconcile such a test with the principle of policy stated by Lord Mansfield CJ in *Holman v. Johnson* ... or with the established principles to which I have referred. G

[15] Lord Goff went on to say:

> Furthermore the adoption of the public conscience test, as stated by Nicholls LJ, would constitute a revolution in this branch of the law, under which what is in effect a discretion would become vested in the court to deal with the matter by the process of a balancing operation, in place of a system of rules, ultimately derived from the principle of public policy enunciated by Lord Mansfield CJ in *Holman v. Johnson*. H

[16] Lord Goff also opined that short of treating the application of the rule as discretionary, it is difficult to make a principled distinction between degrees of iniquity. I

[17] The *Les Laboratoires* case (*supra*) concerned the breach of a patent. On the facts, the court found that there was no basis for the application of the doctrine of illegality. The court however held as follows:

> (Per Lord Sumption, Lord Neuberger and Lord Clarke) The defence of illegality was a rule of law and not a mere discretionary power. It was based on public policy, and not on the perceived balance of merits between the parties to any particular dispute.

[18] They also held as follows:

> Lord Sumption, Lord Neuberger, Lord Clarke and Lord Mance) The *ex turpi causa* principle was concerned with claims founded on acts which were contrary to the public law of the state and engaged the public interest. The question of what constituted 'turpitude' for the purpose of the defence depended on the legal character of the acts relied on. It meant criminal acts and '*quasi*-criminal' acts, as only acts in those categories engaged the public interest which was the foundation of the illegality defence. There might be exceptional cases where even criminal and *quasi*-criminal acts would not constitute turpitude for the purposes of the illegality defence. Torts (other than those of which dishonesty was an essential element), breaches of contract, statutory and other civil wrongs, offended against interests which were essentially private, not public. There was no reason in such a case for the law to withhold its ordinary remedies. The public interest was sufficiently served by the availability of a system of corrective justice to regulate their consequences as between the parties affected.

[19] In respect of their Lordships observations with regard to the restriction of the application of the doctrine to only torts in which dishonesty was an essential element, this was made obiter as the decision itself did not turn upon such a breach.

[20] That aside, what is settled and clearly emanates from the judgment in *Les Laboratoires* is that the doctrine of *ex turpi causa non oritur actio* is based upon pure policy considerations and leaves no room for discretionary application.

[21] With regard to the application of the illegality defence in the realm of tort law, case law has not revealed any form of consistency. In an illuminating article by Muhammad Altaf Hussain Ahangar (Professor, Kulliyah (Faculty) of Laws, International Islamic University Malaysia, titled "*Recoverability of Illegal Earnings In Tort: Need For Legislative Intervention*" (hereinafter, "the said article"), helpfully cited by learned counsel for the respondent, the learned author is of the view that neither the common law based tort law nor the provisions of the Civil Law Act 1956 provide any guidance regarding the recoverability of illegal earnings. The learned author is also of the view that Malaysian decisions do not provide any uniform and definite pronouncement on the issue.

[22] The said article embarks on a journey of exploration on the subject in other Commonwealth jurisdictions most notably, those in Australia, New Zealand and South Africa. The Australian case of *Meadows v. Ferguson* [1961] VR 594 was cited by the article in which the plaintiff in an accident's claim was earning income derived from aiding and abetting a bookmaker in his business which was unlawful. The court held on grounds of public policy to not recognise those earnings as affording a proper basis for the award of damages.

[23] The article reports that *Meadows* was endorsed in the South African case of *Dhlalmini v. Protea Assurance Co Ltd* 1974 (4) SA 906 (A), where an appellate court of five judges held that because of public policy, the plaintiff could not claim damages for income lost while she did not have a licence to be a hawker. However, in *Mankebe NO v. AA Mutual Insurance Association Ltd* 1986 (2) SA 196 (D), recovery was allowed of the proceeds of an illegal trade or business on the basis that such failure did not constitute a danger or potential danger to the public.

[24] In the later South African decision of *Lebona v. President Versekeringssmaatskappy* BPK 1991 (3) SA 391 (cited in the said article), the deceased breadwinner earned his living as an unlicensed hawker. The court held that despite this, he had a duty to support his dependants and that his earning capacity had to be considered.

[25] The *Lebona (supra)* decision was followed by the decision in *Dhlamini v. MMF* 1992 (1) SA 802 where the deceased had contravened s. 31 of the Road Transportation Act 74 of 1977 for illegal taxi driving. The court held that this act of illegal taxi driving could be taken into consideration as an indication of his earning capacity as the deceased could have earned the same monthly income from legal taxi driving.

[26] In the New Zealand case of *Le Bagge v. Buses Ltd* [1958] NZLR 630, a dependency claim was unaffected by the circumstance that the deceased earned a small proportion of his earnings by breaching a regulation by driving his milk float seven days a week.

[27] Later, in the Australian case of *Smith v. Jenkins* (1969) 119 CLR 397, it was held that the maxim *ex turpi causa non oritur actio* has no application to claims in negligence. Windeyer J opining that the historical reason for this being that the Latin word *"causa"* relates to contractual obligation; therefore the maxim has no application to a cause of action arising in tort, that is *ex delicto*. This approach met with approval of the High Court in *Golan v. Nugent* (1988) 166 CLR 18.

[28] However, this viewpoint was roundly criticised by Neil Thompson in his book, "*The Rights of Parties to Illegal Transactions", The Federation Press (1991)*, where he said that "this purely verbal and historical analysis ignores

A the latent question of public policy: If relief is to be denied in respect of contractual obligations by some element of illegality, why is relief to be allowed to a participant in an illegal venture in respect in respect of his claim in tort?"

B **[29]** To resume the narrative revealing the inconsistency with which the courts have viewed and applied the maxim *ex turpi causa non oritur actio*, the English case of *Burns v. Edman* [1970] 2 QB 541, held that the deceased's wife who knew that the money her husband was giving her was obtained from the proceeds of crime, was not entitled to claim damages as his personal representative under the Law Reform (Miscellaneous Provisions) Act 1934
C on the basis that *ex turpi causa non oritur actio* applied. Chrichton J. distinguishing the New Zealand decision in *Le Bagge (supra)* on the basis that the deceased there had earned only a small proportion of his income from illegal activity in relation to his trade.

D **[30]** In another English case of *Gray v. Thames Trains Limited* [2009] UKHL 33, [2009] PIQR P22, (2009) 108 BMLR 205, [2009] 4 All ER 81, [2009] 3 WLR 167, the claimant had been severely injured in a rail crash caused by the defendant's negligence. As a result of his condition, the claimant had gone on to kill another person, and he had been detained. He now sought damages for his loss of earnings through detention in prison and mental
E hospital.

[31] The House of Lords held that such damages could not be claimed successfully once the claimant had been convicted. Though the defendants had admitted their negligence, success for the claimant would be against the public policy maxim *ex turpi causa non oritur actio*. If the case was extreme,
F and the order for detention was made purely for the defendants' mental condition, and not for the criminal behaviour, the maxim might not apply, but that was not the case here.

[32] Lord Hoffmann said: 'there is no dispute that there was a causal
G connection between the tort and the killing. The evidence which the judge accepted was but for the tort, Mr Gray would not have killed. *But the rule of public policy invoked in this case is not based upon some primitive psychology which deems mental stress to be incapable of having a connection with subsequent criminal acts ... the case against compensating Mr Gray for his loss of liberty is based upon the inconsistency of requiring someone to be compensated for a sentence*
H *imposed because of his own personal responsibility for a criminal act.' and 'the maxim ex turpi causa expresses not so much a principle as a policy*. Furthermore, that policy is not based upon a single justification but on a group of reasons, which vary in different situations.' (emphasis added)

I **[33]** Malaysian decisions on the issue have revealed little to suggest any consistency or uniformity of application of the maxim in tort actions. The above referred article "*Recoverability of Illegal Earnings In Tort: Need For*

Legislative Intervention", traces the Malaysian position from the decision of *Tan Chooi Thin (W) & Anor v. Teo Whee Hong* [1953] 1 LNS 105; [1953] MLJ 203. In that case, income derived from private trading by importing and exporting what was alleged to be precious stones in contravention of the customs legislation were not excluded in reckoning the deceased's earnings in a claim for the benefit and on behalf of certain dependants of the deceased who suffered damage from the negligence of the defendant or his servant or agent and also for and on behalf of the estate of the said deceased.

[34] The court referred to the earlier decision in *Kang Bark Teng & Anor v. Lee Kwee Lim & Anor* [1952] LNS 42; [1952] MLJ 27, where the court allowed earnings by the deceased which he made as a hawker of meat when the deceased had no licence to carry on that business and was thereby committing a flagrant breach of s. 194(4) of the Municipal Ordinance.

[35] In *Yaakub Foong Abdullah v. Lai Mun Keong & Anor* [1986] 1 CLJ 355; [1986] CLJ (Rep) 790; [1986] 2 MLJ 317, the plaintiff in a running down case who was a Malaysian citizen working in Singapore, admitted that he did not pay any income tax and had performed additional work in contravention of his work permit. Shankar J (as he then was), said as follows:

> It is too well-established that the plaintiff's pecuniary loss must be computed after taking into account deductions which would have been made on his earnings by way of tax, in cases where his damages will not be subject to tax in his hands. Furthermore, it is well established that *ex turpi causa non oritur actio*. It is no part of a Court's function to compensate a plaintiff for profits which he would have made from an illegal activity had he not been injured.

[36] Still further His Lordship held:

> it must be a matter of concern for a Malaysian Court that Malaysian nationals should be discouraged from abusing the privileges of host countries when they go abroad. The proximity of Singapore to the Federation must make this observation doubly significant. Consequently, if there had been cogent evidence as to the precise amount of tax payable by the plaintiff and of the amount which he had illegally earned in contravention of his work permit, the Court would have discounted the damages arithmetically due to the plaintiff on both counts.

[37] The Supreme Court case of *Chua Kim Suan & Teoh Teik Nam (Suing As Administratrix And Administrator Respectively Of The Estate of Teoh Tek Lee, Deceased) v. Government Of Malaysia & Anor* [1994] 1 CLJ 321; [1994] 1 MLJ 394 held that the income earned from illegal activity (illegal operation of a taxi) was illegally obtained and should be disallowed by reason that it was against public policy. In so holding Peh Swee Chin SCJ said:

> **We have decided after most anxious consideration that any claim for loss of earnings from any illegal source should not be allowed on the ground that it is against public policy**. We think that we would also follow, on this point, the decisions of *Ooi Han Sun*; *Burns*; *Lebagge* and *Dhlamini* and

A approve the *dictum* in question in Yaacob. We therefore uphold the decision of the learned judge in the court below and that of the learned registrar at the first instance that *the claim for that part of damages as related to earnings from the illegal operations of the taxi should be disallowed; because ex turpi causa non oritur actio or, in other words, such claim would be against public policy.* We would like to emphasise the timely caution of the learned Chief
B Justice of Singapore in *Ooi*, that the maxim has a limited application in tort. The maxim's principal role lies mainly and almost exclusively in actions on contract.

We have in deciding so, considered as to whether we should make a distinction between income earned from a very minor transgression of
C law, such as that as revealed by the facts in the instant appeal and those cases of unlicensed hawking on the one hand, and those serious crimes like drug trafficking and armed robbery on the other hand. Such distinction in reality turns on the question of degree of criminality of conduct. Such degree will not alter the basic nature of criminality of such conduct. There are other reasons also for disregarding such distinction.
D There is the great practical difficulty as to when to draw the line between such minor offences and the more serious ones. To attempt to do so would certainly lead to a good deal of confusion and uncertainties, a situation much dreaded by all. To attempt to do so is like trying to distinguish between offences against the rights established by God and those against rights established by man. It is an irrelevant exercise at the
E present time. (emphasis added)

[38] However, in *Tay Lye Seng & Anor v. Nazori Teh & Anor* [1998] 3 CLJ 466; [1998] 3 MLJ 873, the Court of Appeal allowed claims based on illegal earnings where the plaintiff worked in Singapore on an expired work permit, and held:

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Based on authorities, could be said that whilst public policy would defeat any claim based on illegality, a balance has to be drawn based on the peculiar facts and circumstances of each case. The authorities showed that where there is the element of culpability on the part of the plaintiff who claims for loss of earnings or that the claim flowed directly from the
G wrongdoing, the claim would fail. Where he is without fault, he may recover according to the usual principles of measure of damages (see p 878G-H). In the present case, the fact that the respondent had no valid work permit *per se* could not affect his claim for loss of earnings. This is so as the respondent was initially working legally in Singapore. He had a valid work permit issued by the Singapore authorities which expired four
H months before the accident. The obligation to renew the work permit lies with the respondent's employer and since there was no evidence that they had done so, the respondent had not been culpably responsible for the predicament that he had found himself to be in. Under these circumstances, the *maxim ex turpi causa non oritur actio* lacked moral
I justification and to that end was not applicable. (see p 879G-I).

The maxim has a limited application in tort. Its principal role lies mainly and most exclusively in actions on contract.

[39] In the High Court case of *Wakil Diri Bagi Harta Pusaka Atas Rosli Md Nor (Simati) & Ors v. TP Saffeer & Anor* [1998] 4 CLJ 241, the illegal earnings of the plaintiff were legitimised and the courts reasoning as follows:

> But the illegality of the deceased's employment could have been legitimised. At this stage, a repetition of the facts is necessary. The deceased held a red identity card and according to SP1 the deceased was a permanent resident. At the time of the accident, the deceased's father was in Malaysia. SP1 promised to obtain the work permit for the deceased within a period of three months from the date of recruitment. There was no evidence to show that the deceased was unlikely to obtain a work permit. The same scenario appeared in *Nazori bin Teh & Anor v. Tay Lye Seng & Anor* [1995] 4 CLJ 740 where the defendant failed to show that the first plaintiff was unlikely to get a work permit. It was for this reason that the learned judge was of the view that the illegality was capable of being legitimised. At p. 743 of the judgment, the learned judge in *Nazori bin Teh & Anor v. Tay Lye Seng & Anor (supra)* had this to say and which I respectfully adopt:
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> At p. 30 of the judgment, the learned judge citing *Ooi Han Sun & Anor v. Bee Hua May* [1991] 3 MLJ 219, another Singapore High Court case where no work permit was issued, succinctly summarised the principles in *Ooi Han Sun*'s case as follows:
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> (i) that the *maxim ex turpi causa non oritur actio* (no cause of action arises out of a base cause) will apply in law of contract to prevent a plaintiff founding a claim on an illegal act or agreement;
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> (ii) that the maxim has a limited application in tort and the fact that the plaintiff is involved in some wrongdoing does not of itself provide the defendant with a good defence in tort:
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> (iii) the effect of illegality on quantum of damages is not to make compensation hopeless;
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> (iv) that notwithstanding illegality damages would be awarded but there would be a discount for the *ex turpa causa*;
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> (v) that consideration should be given to cases where illegality was capable of being legitimised; and
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> (vi) that the burden of proof of illegality was capable of being legitimised was on the plaintiff.
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> In my judgment, the earnings of the deceased can, in law, be legitimised and that being the case the earnings derived as a cook from Zam Zam restaurant was not illegal. Those earnings can be computed for purposes of loss of earnings sustained by the widow and her son. This was my judgment and I so hold accordingly.

[40] In the Singapore case of *Ooi Han Sun v. Bee Hua Meng* [1991] 1 LNS 110; [1991] 3 MLJ 219 (cited by the learned judge in *Wakil Diri Bagi Harta Pusaka Atas Rosli Md Nor (Simati)) (supra)*, Yong Pung How CJ Singapore, in allowing a claim by the plaintiff for loss of earnings notwithstanding that his earnings were based on a non-existence of a work permit, had this to say:

A As a rule of public policy, the maxim *ex turpi causa non oritur actio* (no cause of action arises out of a base cause) will apply in the law of contract to prevent a plaintiff founding a claim on an illegal act or agreement. It is clear, however, that the maxim has only very limited application in tort and, in general, the fact that the plaintiff is involved in some wrongdoing does not of itself provide the defendant with a good B defence: *Henwood v. Municipal Tramway Trust (SA)* (1938) 60 CLR 438; *National Coal Board v. England* [1954] AC 403; [1954] 1 All ER 546; *Progress and Properties Ltd v. Craft* (1976) 12 ALR 59; *Jackson v. Harrison* (1978) 19 ALR 129. The only exceptions would appear to be the limited range of cases in which, on the facts of the case, an injury can be held to have been directly incurred in the course of the commission of a crime: *Godbolt v.* C *Fittock* (1963) 63 SR (NSW) 617; [1964] NSWR 22; *Smith v. Jenkins* (1970) 44 ALJR 78; *Ashton v. Turner* [1981] QB 137; [1980] 3 All ER 870; *Pitts v. Hunt & Anor* [1990] 3 All ER 344.

[41] In *Sukatno v. Lee Seng Kee* [2009] 4 CLJ 171; [2009] 3 MLJ 306, the Court of Appeal reversed a decision of the High Court in allowing a claim D and the reasons *inter alia* were as follows:

> The argument that at the date of the accident the plaintiff was working illegally was not true because after the accident the plaintiff who was rendered paralysed from the waist downwards returned to Indonesia using his passport which would have contained a valid work permit. If E anything was wrong with the plaintiff's work permit he would have been detained by the immigration but that was not the case. The fact that the plaintiff was working for another employer from the one named in his work permit could not be construed to mean that the plaintiff was working illegally in Malaysia. Taking the evidence in its correct perspective, there was no concrete proof that the plaintiff was an illegal worker or had F contravened the law of this country. As such, the High Court judge failed to assess the evidence judiciously when he set aside the award of RM153,600 for loss of future earnings. The plaintiff's loss of future earnings could not be based on what the plaintiff would have earned in Indonesia because no evidence was led to assist the sessions court judge in this regard. Therefore, based on the available evidence the sessions G court award for loss of future earnings was reinstated.

[42] It is evident that the case was decided on the facts as the court found no evidence that the plaintiff was working illegally.

[43] From a synopsis of the cases above, there appears to be no consistency H in the application of the illegality defence or the application of the maxim *ex turpi causa non oritur actio* or their proper juridical basis. Some courts allowed the claims on the basis that the earnings derived emanated from a source which did not pose a danger or potential danger to the public (*Mankebe NO v. AA Mutual Insurance Association Ltd*), that the defence lacked moral I justification, *(Tay Lye Seng)* or generally, that the maxim had a limited application in tort. Most of the decisions which denied claims originating from an illegal source did so squarely on the basis of public policy.

[44] If the juridical basis for the imposition of the maxim *ex turpi causa non oritur actio* is indeed that of public policy, it necessarily begs the question (and several others), can there be room for the exercise of discretion depending on the facts of the case? Is the court to descend into the making of a moral judgment as to what is or what is not morally justified? Which sources of illegally obtained income is morally reprehensible and which is not? Ordinary and right thinking members of society are more prone to think that the proceeds derived from illegal drug trafficking is so reprehensible as to leave no room for doubt that the illegality doctrine or the maxim *ex turpi causa non oritur actio* would apply. At the other end of the scale would perhaps be, as in the instant case, earnings derived from the illegal operation of a van ferrying school children, a mere possible breach of the provisions under the Road Transport Act 1987 by comparison.

[45] But are the courts to make that call? Would not they then be descending into a morality judgment of what is a major infringement of the law and what is minor? What if there is an intermediate category? Where is the line to be drawn then? The avowed objective of the law is to ensure justice is done. Equally, the objective of the law is also certainty without which members of the public would be unable to bring about an ordering of their affairs. The legal profession would not be able to advise clients with certainty as to the possible outcome. And what of the process of judicial integrity if the courts should look with impunity upon violations of the law, however minuscule, when they are supposed to be the very institution that upholds abiding by the law.

[46] These are some of the questions which arise for consideration but alas, without any easy answers.

Findings And Decision

[47] Reverting to the case at hand, as mentioned earlier, there was no dispute that the deceased's earnings originated from a breach of licensing conditions. The plaintiff admitted as much although that of itself would not have made one jot of difference as an illegal act is illegal nonetheless nor would her denial have made any difference if the facts showed otherwise.

[48] My finding is that because the maxim *ex turpi causa non oritur actio* is based upon policy considerations, I do not find that this leaves any room for the court to indulge in the mechanics of deciding what is reprehensible or repugnant enough to justify allowing or not allowing the claim because of its illegal nature. To allow the claim would be for the court to countenance illegality, however small or insignificant it may be.

[49] The practical considerations of the deceased driving school children without a licence and the dangers it may pose cannot be underestimated. If an accident were to ensue as a result, who would bear the costs of any injury as no insurance (other than third party) would cover the mishap?

[50] Looking at the objectives of the licensing provisions would also mean that the law was enacted for a good reason as there is a presumption that Parliament does not legislate in vain. The avoidance of such mischief as must have been the intent of the licensing provisions would undoubtedly have been aimed at the proper regulation and accountability in conducting such activity as it must also have been to ensure the safety of road users. The ultimate message the court would be sending out if the contrary position were true would be that it is alright to indulge in illegal running of such a service because, even if a fatal accident were to occur, there would be no bar to obtaining relief in the form of damages.

[51] No doubt, the application of the maxim in denying recovery, results in undue hardship to the respondent/plaintiff, who having being grieved at the loss of the breadwinner husband has to now endure further hardship in not being able to claim the loss of earnings. But it is as much the objective of the law to ensure certainty and uphold the integrity of the judicial process in not countenancing a breach of the law as much as it is to dispense justice to those who deserve it.

[52] Not all the cases cited in support by learned counsel for the respondent support the cause for which he argues.

[53] In the case of *Tan Choon Thin(W) & Anor v. Teo Whee Hong (supra)*, there was no evidence on the facts to show that the business carried on by the deceased consisted in illegal trading in contravention of custom legislation. The learned judge there did say that: "But even if there was reliable evidence as to the nature of the business I do not think that profits made from that business could be excluded in reckoning the deceased's earnings." This statement therefore was made obiter as it was not necessary to the decision made in the light of the facts that obtained.

[54] In *Sukatno v. Lee Seng Kee (supra)*, the Court of Appeal held that the allegation that the plaintiff as at the date of the accident was working illegally was not true because after the accident the plaintiff returned to Indonesia using his passport which would have contained a valid work permit. So the facts there can be distinguished.

[55] In the case of *Tay Lye Seng & Anor v. Nazori Teh & Anor (supra)*, the Court of Appeal held that the fact that the first respondent had no valid work permit *per se* could not affect his claim for loss of earnings in Singapore because the first respondent was working legally in Singapore initially. This is far removed from the facts here where the illegal act is *ab initio*. In any event, as I have stated above, the basis of public policy does not admit of any room for discretion on the factual matrix involved. An illegal act is illegal whether or not its infringement is major or relatively minor.

[56] I find myself compelled to agree with the reasoning employed in *Chua Kim Suan & Teoh Teik Nam (Suing As Administratrix And Administrator Respectively Of The Estate Of Teoh Tek Lee, Deceased) v. Government of Malaysia (supra)*, not the least reason being that it is a decision of the precursor to the present Federal Court of which I am necessarily bound by *stare decisis*.

[57] The reasoning of Peh Swee Chin SCJ merits reproduction when he held:

> We have in deciding so, considered as to whether we should make a distinction between income earned from a very minor transgression of law, such as that as revealed by the facts in the instant appeal and those cases of unlicensed hawking on the one hand, and those serious crimes like drug trafficking and armed robbery on the other hand. Such distinction in reality turns on the question of degree of criminality of conduct. Such degree will not alter the basic nature of criminality of such conduct. There are other reasons also for disregarding such distinction. There is the great practical difficulty as to when to draw the line between such minor offences and the more serious ones. To attempt to do so would certainly lead to a good deal of confusion and uncertainties, a situation much dreaded by all. To attempt to do so is like trying to distinguish between offences against the rights established by God and those against rights established by man. It is an irrelevant exercise at the present time.

[58] If the very basis of the maxim is that of public policy, it must be that what is illegal is illegal without exception. As opined by the learned judge above, to attempt a distinction between various degrees of criminality would inevitably lead to confusion and uncertainty which is surely not the avowed objectives of the legal process.

[59] Although the Supreme Court in *Chua Kim Suan* made the observation that the maxim is of limited application in tort, if the juridical basis of the maxim is that of public policy, there seems to be no valid basis for such distinction. As pointed out by Neil Thompson in his seminal work alluded to previously, *"The Rights of Parties to Illegal Transactions"*, if public policy is the basis for denial of relief in contract by some element of illegality, why is relief allowed to a participant to an illegality in tort?

[60] The ultimate solution perhaps lies, as was advocated by the learned author of the article, "*Recoverability of Illegal Earnings In Tort: Need For Legislative Intervention*" earlier referred to, in amendment to the Civil Law Act 1956 to make the position regarding such recoverability clear. Meanwhile, the courts as the custodians of justice cannot be seen to countenance any violation of the law however major or minor.

[61] Lest it be misunderstood, a distinction has to be made between a dependency claim for loss of earnings arising from an illegal source, and a claim arising as a cause of action for negligence where the injured party in

A a running down action might himself be in breach of some traffic law or regulation. What I have said here applies only to the former but not necessarily to the latter. Put another way, a road user who himself is guilty of a breach of road traffic regulations but suffers injury as a result of the negligent act of another does not necessarily see his or her claim as a whole
B being extinguished altogether due to the illegality.

[62] In the High Court case of *Siti Rohani Mohd Shah & Ors v. Hj Zainal Hj Saifiee & Anor* [2001] 1 CLJ 498, where the appellant who was the rider of a motorcycle was 11 years old and without a driving licence collided with a lorry at a sharp bend in the road, it was held:

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> Riding or driving without a valid license *per se* is not negligent. The law does not sanction a person without a valid licence to be riding or driving a vehicle on the road, but that person is not fair game with no rights. He is still entitled to the same duty of care expected of to be accorded to all on and adjacent to the road. The only remedy or penalty is that prescribed
D in the Road Transport Act 1987. The remedy is not an actionable wrong.

[63] To drive home the point, the court there observed as follows:

> Mr Harjit Singh Nijar for the appellants submitted that the penalty for driving without a licence is only that under the Road Traffic Act 1987. It should not blackball the 1st appellant from maintaining an action.
E
> ..... "Would a negligent driver's fault (vanish) because the other party was not licensed?" Mr Harjit, who himself asked the question, answered "No". In *Chu Kim Sing & Anor v. Abdul Razak Amin* [1999] 4 CLJ 448, the rider succeeded in his claim, even though he was without a valid licence.

F **[64]** The above decision relied upon another decision of the High Court in *Che Wil Che Ali v. Mahmood Ismail* [1982] CLJ 484; [1982] CLJ (Rep) 420, where the deceased who had contravened r. 35 of the Road Traffic Rules 1959 by peddling a trishaw at night with no lights was collided into by a motorist travelling in the same direction. The court held:

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> The Court is of the opinion however breach of the rules is not in itself evidence of negligence on the part of the person concerned. The question that has to be decided is who is negligent.

[65] This was also made abundantly clear by the then Supreme Court in the *Chua Kim Suan* case *(supra)* which held:

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> ... the claim **for that part of damages** as related to earnings from the illegal operations of the taxi should be disallowed; because *ex turpi causa non oritur actio* or, in other words, such claim would be against public policy." (emphasis added)

[66] Loss of earnings therefore arising from a cause of action in negligence
I due in part to some illegal or unlawful act on the part of the injured party will only be irrecoverable where the source from which they were derived was illegal. In some measure, the law does provide for adjustment for such cases in the form of contributory negligence on the part of the plaintiff.

Damages which are claimed from a legal source is not therefore barred in such a claim for negligence where there was some breach of a law or statute on the part of the claimant.

[67] Reverting back to the *ex turpi causa non oritur actio maxim*, and to the mainstream of this judgment, public policy considerations demand that any breach of the law results in consequences adverse to the party relying on it. The dependency claim for loss of earnings by the respondent therefore ought not to have been allowed by the Sessions Court on the ground of the application of the *maxim ex turpi causa non oritur actio*. This therefore brings this appeal within the category of cases where appellate intervention is warranted as a wrong principle of law was followed. See *Topaiwah v. Salleh* [1968] 1 LNS 161; [1968] 1 MLJ 284.

[68] In the upshot, this appeal is allowed with costs. The sum of RM61,200 as dependency claim awarded by the Sessions Court is hereby set aside.